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No. 71-154

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

MICHAEL A. TOUGHER, JR. and AMELIA L. TOUGHER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A 1-19) is reported at 51 T.C. 737. The opinion of the court of appeals (Pet. App. B 18) is reported at 441 F. 2d 1148.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1971 (Pet. App. B 18). The petition for

a writ of certiorari was filed on August 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether groceries and household supplies purchased by petitioner for family consumption and use at a store maintained by his employer constituted "meals * * * furnished to him by his employer," the value of which is excludable from petitioner's gross income under Section 119 of the Internal Revenue Code of 1954.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.
>
> There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—
>
> (1) in the case of meals, the meals are furnished on the business premises of the employer, or
>
> (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.
>
> In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall

not be determinative of whether the meals or lodging are intended as compensation.

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

Petitioner [1] is an electronic technician employed by the Federal Aviation Agency at its facilities on Wake Island, a United States possession located in the middle of the Pacific Ocean. During the taxable years (1963 and 1964), petitioner resided with his wife and children in housing provided by the FAA. The family purchased groceries and other household supplies at a commissary maintained by the FAA and ate its meals at home. No amounts were deducted from petitioner's salary for items purchased at the commissary, payment being made in cash, either at the time of purchase or on a monthly basis. Petitioner was not required to shop at the commissary or purchase any fixed amount of food and, although it was not generally feasible to do so, the family did, on infrequent occasions, obtain food from other sources. (Pet. App. A 2-3, 7-11, 16.)

On their income tax returns for 1963 and 1964, petitioners subtracted from their gross income the

[1] References to "petitioner" are to Michael A. Tougher, Jr. Amelia L. Tougher is a party solely because joint income tax returns were filed for the years in issue.

value of the "food" purchased at the commissary. The Commissioner determined that the amounts expended for food purchases were unallowable deductions. The Tax Court sustained the Commissioner's determination (Pet. App. A 1-19), and the court of appeals affirmed (Pet. App. B 18).

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review.

1. In holding that the cost of groceries purchased by petitioner at the FAA commissary could not be excluded from gross income under Section 119 of the Internal Revenue Code of 1954, *supra*, pp. 2-3, the courts below reached the only result consistent with the limited purpose of the statute and the ordinary meaning of its language. Section 262 of the Code, *supra*, p. 3, prohibits any deduction for personal, living or family expenses, such as the cost of groceries. Section 119 does not carve out any exception to the general rule against deductibility; indeed, it was not even designed to permit a taxpayer to deduct amounts expended for food or meals. As the relevant decisions uniformly recognize, Section 119 was enacted to provide specific rules for determining whether the value of meals and lodging furnished in kind by an employer to an employee should be taxable as additional compensation or, instead, excludable from gross income on the ground that the benefits were provided for an essentially noncompensatory purpose, such as the convenience of the employer. See, *e.g.*,

Commissioner v. *Anderson*, 371 F. 2d 59 (C.A. 6), certiorari denied, 387 U.S. 906; *Boykin* v. *Commissioner*, 260 F. 2d 249 (C.A. 8); *Wilson* v. *United States*, 412 F. 2d 694 (C.A. 1). By its very nature, Section 119 does not apply to the expenditures at issue here, since the value of the groceries purchased would in no event be treated as additional taxable compensation. In effect, petitioner is seeking to deduct typical family grocery expenses, items which are not dealt with at all in Section 119 and are specifically rendered non-deductible by Section 262.[2]

The decisions below are also correct on a wholly independent ground—namely, that the sale of groceries by an employer to an employee does not constitute the furnishing of "meals" to the employee within the meaning of Section 119. The FAA neither served meals to petitioner and his family (or any family groups residing on Wake Island) nor reimbursed petitioner for the cost of food. Virtually the only meals consumed by petitioner's family were prepared at home from groceries purchased for cash from the FAA commissary. The courts below would have inordinately strained the statutory language had they extended the term "meals" to embrace groceries purchased for home consumption. Nothing in the statute, its history, the administrative regulations or the decisions warrants the view that Congress in-

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[2] Clearly, Section 119 has no application to food consumed by petitioner's wife and children, who were not employees, or with respect to non-food items which are not covered in the statute. Cf. *Armstrong* v. *Phinney*, 394 F. 2d 661 (C.A. 5).

tended to accord preferential tax treatment to the ordinary purchaser of groceries. On the contrary, the legislative history unequivocally confirms the conclusion reached below that Congress contemplated the word "meals" to be construed in its plain and ordinary sense—*i.e.*, to mean food prepared for consumption at recognized occasions such as breakfast, lunch or dinner. See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A38-A39; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 190-191.

2. Contrary to petitioner's suggestion (Pet. 13-14), the decision below is not in conflict with *United States* v. *Morelan*, 356 F. 2d 199 (C.A. 8), *United States* v. *Keeton*, 383 F. 2d 429 (C.A. 10), *United States* v. *Barrett*, 321 F. 2d 911 (C.A. 5), or *Wilson* v. *United States*, *supra*. Those cases, involving, *inter alia*, the question whether cash subsistence allowances made to state highway patrolmen constitute "meals" furnished in kind, excludable from the patrolman's taxable wages under Section 119, arise on wholly different facts. Unlike the patrolman, petitioner has not been given any allowance for the cost of his food, nor has the FAA deducted any grocery charge from petitioner's salary. He merely has purchased food for cash, just as he might have done at any supermarket in the United States. Moreover, the cases cited by petitioner (Pet. 13), limited as they are to the unique situation of state highway patrolmen, furnish no authority for petitioner's broad construction of the term "meals." They turn on the narrow and very different question—on which the courts concededly are not uniform in their approach

—whether monetary reimbursements for meals purchased at a public restaurant qualify as meals furnished in kind on the business premises of the employer.

3. The instant case does not, as petitioner asserts (Pet. 15-16), present an issue of great and recurring significance in the administration of Section 119. Petitioner's exclusive reliance on cases involving state highway patrolmen in the United States emphasizes the paucity of litigation involving isolated taxpayers similar to petitioner. As for petitioner's claim (Pet. 16) that the holding below in some way discriminates between employees purchasing prepared food and those purchasing groceries at a commissary, it may simply be noted that there exist sufficient differences between the two situations to justify differing tax treatment by Congress. See *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4; *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809. The furnishing of meals is primarily for the convenience of the employer, who has the benefit of controlling the time, place, and duration of their consumption by the employee to expedite his work. With the purchase of groceries the options are within the employee's control. Special tax treatment is not required by reason of the adverse conditions of taxpayer's employment. See *Sanders* v. *Commissioner*, 439 F. 2d 296 (C.A. 9), taxpayer's petition for certiorari pending, No. 70-185, this Term.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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